UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRITTANY AMBRIDGE, Plaintiff, v. DOMINO MEDIA GROUP, INC. and CLIFF SIRLIN, Defendants.	Case No. 15 Civ. 9944 (VSB)(GWG) ANSWER AND COUNTERCLAIMS

Defendants Domino Media Group, Inc., f/k/a Project Décor, Inc. ("Domino") and Cliff Sirlin ("Sirlin") (collectively, "Defendants"), as and for their Answer to the Complaint of plaintiff Brittany Ambridge ("Ambridge" or "Plaintiff"), respond as follows:

NATURE OF ACTION

1. Deny each and every allegation set forth in paragraph 1 of the Complaint.

2. Deny each and every allegation set forth in paragraph 2 of the Complaint.

3. Deny each and every allegation set forth in paragraph 3, of the Complaint except admit that plaintiff is seeking the damages set forth therein.

JURISDICTION AND VENUE

4. Deny each and every allegation set forth in paragraph 4 of the Complaint as legal conclusions to which no responsive pleading is required.

5. Deny each and every allegation set forth in paragraph 5 of the Complaint, except admit that Domino has an office within the Southern District of New York and that, from time to time, Sirlin works in that office, among other offices.

PARTIES

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 6 of the Complaint.

7. Admit the allegations set forth in paragraph 7 of the Complaint.

8. Admit the allegations set forth in paragraph 8 of the Complaint.

9. Deny each and every allegation set forth in paragraph 9 of the Complaint.

10. Deny each and every allegation set forth in paragraph 10, except admit that Sirlin made the decision to eliminate Plaintiff's position?

11. Deny each and every allegation set forth in paragraph 11 of the Complaint, except admit that Domino has had a gross volume of business of not less than $500,000 per year, and deny the allegation that Domino is a covered employer as a legal conclusion to which no responsive pleading is required.

12. Deny each and every allegation set forth in paragraph 12 of the Complaint, except deny the allegations concerning Domino and Plaintiff as legal conclusions to which no responsive pleading is required.

13. Deny each and every allegation set forth in paragraph 13 of the Complaint, except deny the allegations concerning Domino as legal conclusions to which no responsive pleading is required.

14. Deny each and every allegation set forth in paragraph 14 of the Complaint.

FACTUAL ALLEGATIONS

15. Admit the allegations set forth in paragraph 15 of the Complaint.

16. Deny each and every allegation set forth in paragraph 16 of the Complaint, and respectfully refers the Court to the Offer Letter to Ambridge dated May 10, 2013 ("Offer Letter") and the Employee Proprietary Information and Inventions Agreement (the "Agreement") between Domino and Ambridge for their contents.

17. Deny each and every allegation set forth in paragraph 17 of the Complaint, and refer the Court to the Offer Letter and Agreement for their contents.

18. Deny each and every allegation set forth in paragraph 18 of the Complaint.

19. Deny each and every allegation set forth in paragraph 19 of the Complaint.

20. Deny each and every allegation set forth in paragraph 20 of the Complaint.

21. Deny each and every allegation set forth in paragraph 21 of the Complaint.

22. Deny each and every allegation set forth in paragraph 22 of the Complaint, except admit that Domino did not pay overtime wages to Ambridge, as no such wages were required and nor was Ambridge entitled to same.

23. Deny each and every allegation set forth in paragraph 23 of the Complaint, except admit that Domino did not pay overtime wages to Ambridge, as no such wages were required and nor was Ambridge entitled to same.

24. Deny each and every allegation set forth in paragraph 24 of the Complaint.

25. Deny each and every allegation set forth in paragraph 25 of the Complaint.

26. Deny each and every allegation set forth in paragraph 26 of the Complaint.

27. Deny each and every allegation set forth in paragraph 27 of the Complaint, except deny knowledge or information sufficient to form a belief as to where or when Ambridge slept.

28. Deny each and every allegation set forth in paragraph 28 of the Complaint.

29. Deny each and every allegation set forth in paragraph 29 of the Complaint.

30. Deny each and every allegation set forth in paragraph 30 of the Complaint, except admit that Ambridge traveled in connection with her performance of her position, and that Domino did not pay overtime wages to Ambridge, as no such wages were required and nor was Ambridge entitled to same.

31. Deny each and every allegation set forth in paragraph 31.

32. Deny each and every allegation set forth in paragraph 32, except admit that Ambridge asked for a raise and was she told she would not be up for one until her one year mark in May 2014.

33. Deny each and every allegation set forth in paragraph 33 of the Complaint.

34. Deny each and every allegation set forth in paragraph 34 of the Complaint, except admit that at approximately one time Plaintiff asked for additional support.

35. Deny each and every allegation set forth in paragraph 35 of the Complaint.

36. Deny each and every allegation set forth in paragraph 36 of the Complaint, except admit that Plaintiff asked for (and received) a raise and that at approximately one time Plaintiff asked for additional support.

37. Deny each and every allegation set forth in paragraph 37 of the Complaint.

38. Deny each and every allegation set forth in paragraph 38 of the Complaint.

39. Deny each and every allegation set forth in paragraph 39 of the Complaint.

40. Deny each and every allegation set forth in paragraph 40 of the Complaint, except admit that Domino gave Ambridge a raise.

41. Deny each and every allegation set forth in paragraph 41 of the Complaint, except denies knowledge or information sufficient to form a belief as to whether Ambridge told Robert Leleux ("Leleux") the allegations set forth therein.

42. Deny each and every allegation set forth in paragraph 42, except denies knowledge or information sufficient to form a belief as to whether Leleux told Ambridge the allegations set forth therein.

43. Deny each and every allegations set forth in paragraph 43 of the Complaint.

44. Deny each and every allegation set forth in paragraph 44 of the Complaint.

45. Deny each and every allegation set forth in paragraph 45, and refer to the email from Sirlin to Plaintiff dated April 27, 2015 for its contents.

46. Deny each and every allegation set forth in paragraph 46, and refer to the email from Sirlin dated April 27, 2015 for its contents.

47. Deny each and every allegation set forth in paragraph 47 of the Complaint.

FIRST CLAIM

(Failure to pay overtime under the Fair Labor Standards Act)

48. Repeat and reallege the allegations set forth in paragraph 1-47 as if fully set forth herein.

49. Deny each and every allegation set forth in paragraph 49 of the Complaint.

50. Deny each and every allegation set forth in paragraph 50 of the Complaint.

51. Deny each and every allegation set forth in paragraph 51 of the Complaint.

52. Deny each and every allegation set forth in paragraph 52 of the Complaint.

SECOND CLAIM

(Failure to pay overtime wages under New York Labor Law and Violation of the Wage Theft Prevention Act)

53. Repeat and reallege the allegations set forth in paragraphs 1-52 as if fully set forth herein.

54. Deny each and every allegation set forth in paragraph 54 of the Complaint.

55. Deny each and every allegation set forth in paragraph 55 of the Complaint.

56. Deny each and every allegation set forth in paragraph 56 of the Complaint.

57. Deny each and every allegation set forth in paragraph 57 of the Complaint.

THIRD CLAIM

(Unlawful retaliation under Fair Labor Standards Act and New York Labor Law)

58. Repeat and reallege the allegations set forth in paragraphs 1-57 as if fully set forth herein.

59. Deny each and every allegation set forth in paragraph 59 of the Complaint.

60. Deny each and every allegation set forth in paragraph 60 of the Complaint.

61. Deny each and every allegation set forth in paragraph 61 of the Complaint.

62. Deny each and every allegation set forth in paragraph 62 of the Complaint.

63. Deny each and every allegation set forth in paragraph 63 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

64. The Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

65. Plaintiff's claims are barred, in whole or in part, because Plaintiff is exempt from overtime pay as an employee employed in a bona fide executive, administrative or professional capacity pursuant to, inter alia the FLSA, 29 U.S.C. § 213, and/or New York Labor Law.

THIRD AFFIRMATIVE DEFENSE

66. Plaintiff's claims are barred, in whole or in part, because any alleged act or omission was in good faith in conformity with and in reliance on an "administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which [employee] belonged", pursuant to, inter alia, 29 U.S.C. § 258.

FOURTH AFFIRMATIVE DEFENSE

67. Plaintiff's claims for liquidated damages are barred because any alleged

act or omission was in good faith and with a reasonable grounds for believing such act or omission was not in violation of the FLSA, 29 U.S.C. § 260, and/or New York Labor Law.

FIFTH AFFIRMATIVE DEFENSE

68. Plaintiff's claims are barred, in whole or in part, by the applicable statute of limitations, including as set forth at 29 U.S.C. § 255.

SIXTH AFFIRMATIVE DEFENSE

69. Plaintiff's claims are barred, in whole or in part, because any alleged work performed by Plaintiff for which Plaintiff seeks overtime compensation is *de minimis* under 29 C.F.R. § 785.47 and/or New York Labor Law.

SEVENTH AFFIRMATIVE DEFENSE

70. Plaintiff's claims are barred by payment in that Plaintiff has received all compensation to which she is entitled.

EIGHTH AFFIRMATIVE DEFENSE

71. Plaintiff's claims are barred, in whole or in part, by setoff or offset due to Plaintiff's receipt of additional compensation, stock and/or other job-related benefits.

NINTH AFFIRMATIVE DEFENSE

72. Plaintiff's claims are barred, in whole or in part, because of her intentional, willful, reckless and/or negligent destruction or spoliation of relevant evidence, including her Domino email Inbox.

TENTH AFFIRMATIVE DEFENSE

73. Plaintiff's claims as against Sirlin are barred because Sirlin is not an employer or otherwise subject to the FLSA or New York Labor Law.

ELEVENTH AFFIRMATIVE DEFENSE

74. Plaintiff's claims are barred, in whole or in part, by the doctrines of

waiver, estoppel, ratification and/or laches.

TWELFTH AFFIRMATIVE DEFENSE

75. Plaintiff's claims are barred, in whole or in part, because the acts or omissions complained of were for legitimate, non-retaliatory reasons.

THIRTEENTH AFFIRMATIVE DEFENSE

76. Plaintiff's claims are barred, in whole or in part, by her failure to mitigate her damages, if any.

FOURTEENTH AFFIRMATIVE DEFENSE

77. Plaintiff's claims are barred, in whole or in part, because Defendants acted in good faith and in accordance with applicable law.

FIFTEENTH AFFIRMATIVE DEFENSE

78. Plaintiff's claims are barred, in whole or in part, because she failed to exhaust her administration remedies.

SIXTEENTH AFFIRMATIVE DEFENSE

79. Plaintiff's claims are barred, in whole or in part, by the faithless servant doctrine, her breaches of fiduciary duty, and the doctrine of after acquired evidence, as well as by the Counterclaims set forth herein.

SEVENTEENTH AFFIRMATIVE DEFENSE

80. Defendants give notice that they intend to rely upon other defenses that may become available or become apparent during subsequent proceedings in this matter and reserve the right to amend their Answer to assert such defenses.

FIRST COUNTERCLAIM

(Faithless Servant, asserted by Domino)

81. Domino repeats and realleges the allegations set forth in paragraphs 1 - 80

above as if fully set forth herein.

82. Ambridge was employed by Domino in a position of trust and confidence, owed a duty of fidelity to Domino, and was at all times bound to exercise the utmost good faith and loyalty in the performance of her duties. As an employee of Domino, Plaintiff was prohibited from acting in a disloyal manner, or in any way inconsistent with the employment relationship.

83. While employed at Domino, Ambridge engaged in outside business activities to the detriment of Domino and/or to the exclusion of her duty to devote her time and energies to Domino.

84. In particular, Ambridge, while employed by Domino, and during regular business hours during which she was supposed to be working for Domino, used Domino resources and monies to perform work for others and pocketed the revenues for herself, without the knowledge or consent of Domino.

85. For example, Ambridge agreed to photograph a San Francisco home for a third party, and did so while employed by Domino and using Domino's resources and expenses. Ambridge kept the revenue for herself.

86. Further, upon information and belief, Ambridge similarly performed photography work for the HighBoy in January 2015, using Domino resources and wrongfully retaining the revenue -- all while a full-time employee of Domino.

87. Second, while employed by Domino, Ambridge misappropriated Domino property by emailing Domino-owned photographs to her personal email address. Upon information and belief, Ambridge used, and is improperly using, such photographs to obtain revenues for herself, without compensating Domino.

88. Plaintiff's disloyalty permeated her services in its most material and substantial part.

89. Accordingly, as a consequence of the foregoing, Domino is entitled to recover all compensation paid to Ambridge, including salary, health insurance premiums paid on her behalf, other expenses paid on her behalf, lost revenues and expenses as a result of her misconduct, revenues collected by Ambridge through the conduct described above, plus interest, costs, reasonable attorneys' fees and punitive damages, as allowable by law.

SECOND COUNTERCLAIM

(Breach of Fiduciary Duty, asserted by Domino)

90. Domino repeats and realleges the allegations set forth in paragraphs 1 - 89 above as if fully set forth herein.

91. Ambridge was employed by Domino in a position of trust and confidence, owed a duty of fidelity to Domino, and was at all times bound to exercise the utmost good faith and loyalty in the performance of her duties. As an employee of Domino, Plaintiff was prohibited from acting in a disloyal manner, or in any way inconsistent with the employment relationship.

92. While employed at Domino, Ambridge engaged in outside business activities to the detriment of Domino and/or to the exclusion of her duty to devote her time and energies to Domino.

93. In particular, Ambridge, while employed by Domino, and during regular business hours during which she was supposed to be working for Domino, used Domino resources and monies to perform work for others and pocketed the revenues for herself, without the knowledge or consent of Domino.

94. For example, Ambridge agreed to photograph a San Francisco home for a third party, and did so while employed by Domino and using Domino's resources and expenses. Ambridge kept the revenue for herself.

95. Further, upon information and belief, Ambridge similarly performed photography work for the HighBoy in January 2015, using Domino resources and wrongfully retaining the revenue -- all while a full-time employee of Domino.

96. Second, while employed by Domino, Ambridge misappropriated Domino property by emailing Domino-owned photographs to her personal email address. Upon information and belief, Ambridge used, and is improperly using, such photographs to obtain revenues for herself, without compensating Domino.

97. Third, shortly after Domino terminated Ambridge's employment, Ambridge intentionally and willfully deleted the contents of her Domino email Inbox, unbeknownst to Domino. Ambridge did so while she still had access to the emails and a continuing duty as an employee and fiduciary to preserve the emails. Further, upon information and belief, at the time Ambridge destroyed the emails, she was contemplating a claim against Domino, and for this reason as well had a duty to preserve the emails.

98. Ambridge's deletion and spoliation of her email Inbox has caused harm and prejudice to Domino. A key issue in this action is whether Ambridge, by virtue or her role at Domino, is exempt from any entitlement to overtime compensation. Correspondence relating to her role is directly relevant to proving her role at Domino. By destroying the evidence, Plaintiff has harmed and caused damage to Domino, including hampering Domino's ability to defend itself in this action, causing Domino to incur additional expenses in this action including the necessity of proving Ambridge's destruction of evidence and seeking remedies therefore, and

causing harm to Domino as a result of the loss of company property.

99. Accordingly, as a consequence of the foregoing, Domino is entitled to recover all compensation paid to Ambridge, including salary, health insurance premiums paid on her behalf, other expenses paid on her behalf, lost revenues and expenses as a result of her misconduct, revenues collected by Ambridge through the conduct described above, and damages caused to Domino as the result of Ambridge's destruction of evidence, plus interest, costs, reasonable attorneys' fees and punitive damages, as allowable by law.

THIRD COUNTERCLAIM

(Breach of Contract, By Domino)

100. Domino repeats and realleges the allegations set forth in paragraphs 1-99 above as if fully set forth herein.

101. Ambridge and Domino entered into an Employee Proprietary Information and Inventions Agreement effective on the commencement of Ambridge's employment with Domino (the "Agreement").

102. Under the Agreement, Ambridge expressly agreed not to compete with Domino or perform work for any other person without prior written consent of Domino:

> **As an Employee**. During my employment with the Company, I will not directly or indirectly: (i) Cause any person to leave their employment with the Company (other than terminating subordinate employees in the course of my duties for the Company); (ii) Solicit any Business Partner; (iii) act in Any Capacity in or with respect to any commercial activity which competes, or is reasonably likely to compete, with any business that the Company conducts, proposes to conduct or demonstrably anticipates conducting, at any time during my employment (a "Competing Business"); or (iv) enter into in an employment, consulting or other similar relationship with another person or entity that requires a significant time commitment without the prior written consent of the Company.

(Agreement, § 4(c)).

103. Further, Ambridge expressly agreed that, for twelve months after

termination, she would not solicit any Business Partner of Domino:

> **After Termination**. For the period of Twelve (12) months immediately following termination of my employment with the Company (for any or no reason, whether voluntary or involuntary), I will not directly or indirectly: (i) Cause any person to leave their employment with the Company; (ii) Solicit any Business Partner. The foregoing time frames shall be increased by the period of time from the commencement of any violation of the foregoing provisions until such time as I have cured such violation.

(Agreement, § 4(d)).

104. Ambridge breached § 4(c) of her Agreement by, inter alia, engaging in competing and/or other work as more fully set forth in paragraphs 84-87 above.

105. Further, Ambridge breached § 4(d) of her Agreement by, inter alia, soliciting Abrams Books, a Business Partner of Domino, to publish her proposed book entitled "Southern Style Now".

106. Domino fully performed its obligations under the Agreement.

107. Domino has suffered damages arising from Ambridge's breaches of the Agreement.

108. Accordingly, as a consequence of the foregoing, Domino is entitled to recover all compensation paid to Ambridge, including salary, health insurance premiums paid on her behalf, other expenses paid on her behalf, lost revenues and expenses as a result of her misconduct, revenues collected by Ambridge through the conduct described above, plus interest costs, and reasonable attorneys' fees as allowable by law.

FOURTH COUNTERCLAIM

(Tortious Interference With Contract, asserted by Domino)

109. Domino repeats and realleges the allegations set forth in paragraphs 1 - 108 above as if fully set forth herein.

110. Ambridge is and was well aware that Leleux's agreement with Domino contains a non-compete and non-solicitation clause. Ambridge is and was so aware because, inter alia, her Agreement with Domino contained similar if not identical provisions and, upon information and belief, through discussions with Leleux.

111. In particular, Leleux's Employee Proprietary Information and Inventions Agreement, as confirmed by the letter agreement dated August 17, 2015 (collectively, the "Leleux Agreement") provides, in pertinent part:

> Should employment be terminated during months Twenty Four (24) thru Thirty Six (36) from the effective date of this Agreement at employee's election or as the result of Termination for Cause, I will not directly or indirectly: (i) Cause any person to leave their employment with the Company; (ii) Solicit any Business Partner; or (iii) act in Any Capacity in or with respect to any Competing Business located within the United States for the period of six (6) months immediately following termination of my employment with the Company. . . . The foregoing time frames shall be increased by the period of time from the commencement of any violation of the foregoing provisions until such time as I have cured such violation. (Emphasis added).

112. Ambridge intentionally induced Leleux to breach the Leleux Agreement with Domino or otherwise rendered his performance impossible by causing Leleux to solicit Abrams Books, a "Business Partner" of Domino to publish their joint book, entitled "Southern Style Now" in violation of the non-solicitation provision set forth in subsection (ii) quoted above. Further, Ambridge caused Leleux to breach the non-compete provision quoted at subparagraph (iii) above by pursuing the Book. Ambridge and Leleux have conceded that the Book directly competes with Domino and its book "Domino: the book of Decorating", such as by describing their book as "Domino meets Garden & Gun".

113. As a result, Domino has suffered damages. In particular, Domino paid Leleux compensation and other benefits in consideration of Leleux's non-competition and non-solicitation agreements. As a result of Leleux's breach as induced by Ambridge, Domino has not

received the full value of such compensation and/or other benefits, and has been damaged thereby. Further, Domino is entitled to recover any ill-gotten revenues received by Ambridge arising from her tortious interference with contract and the resulting competing venture.

114. Accordingly, as a consequence of the foregoing, Domino is entitled to recover the value of any and all compensation and other benefits paid to Leleux in consideration of Leleux's non-competition and non-solicitation agreements, as well as any revenues received by Ambridge arising from the competing venture, plus interest, costs, reasonable attorneys' fees, and punitive damages, as allowable by law.

WHEREFORE, Defendants demand judgment:

(i) dismissing Plaintiff's claims with prejudice;

(ii) on the First Counterclaim, awarding Domino all compensation paid to Ambridge, including salary, health insurance premiums paid on her behalf, other expenses paid on her behalf, lost revenues and expenses as a result of her misconduct, and revenues collected by Ambridge arising from her misconduct as a faithless servant;

(iii) on the Second Counterclaim, awarding Domino all compensation paid to Ambridge, including salary, health insurance premiums paid on her behalf, other expenses paid on her behalf, lost revenues and expenses as a result of her misconduct, revenues collected by Ambridge through her breaches of her fiduciary duty, and damages caused to Domino as the result of Ambridge's destruction of evidence;

(iv) on the Third Counterclaim, awarding Domino all compensation paid to Ambridge, including salary, health insurance premiums paid on her behalf, lost revenues or expenses as a result of her misconduct, and revenues collected by Ambridge through the conduct described above;

(v) on the Fourth Counterclaim, awarding Domino all compensation and other benefits paid to Leleux in consideration of Leleux's non-competition and non-solicitation agreements, as well as any revenues received by Ambridge arising from the competing venture;

(vi) awarding Defendants their interest, costs, attorney's fees and expenses as allowable by law; and

(vii) such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 2, 2016

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